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# No. 79-1597

# In the Supreme Court of the United States

October Term, 1979

CANAL KEYHEA,

*Appellant,*

vs.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.

*Appellees.*

## APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

On Appeal from the Court of Appeal for the State of California, First Appellate District

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## In the Supreme Court of the United States

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J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.,

*Appellees.*

## APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

**On Appeal from the Court of Appeal for the State of California, First Appellate District**

Appellees' motion to dismiss or affirm neither defends the California Court of Appeal's holding that this action was moot nor explains that court's *sub silentio* rejection of the well established principles set forth in *Sibron* v. *New York*, 392 U.S. 40 (1968) and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Rather, appellees' principal argument is that appellant is not entitled to either declaratory relief or relief in the form of expungement because the decision in *Vitek* v. *Jones*,

.... U.S. ...., 100 St. Ct. 1254 (1980) should be given solely prospective application (Motion to Dismiss or Affirm 10-11). Appellees are incorrect for two reasons. First, the question of the "retroactivity" of the *Vitek* decision is not even presented because *Vitek* did not represent a sharp departure from prior law. Second, even assuming that the retroactivity question was presented, *Vitek* is fully retroactive.

## I.

### THE QUESTION OF PROSPECTIVE APPLICATION OF VITEK IS NOT PRESENTED BECAUSE VITEK DID NOT CONSTITUTE A SHARP BREAK IN THE WEB OF THE LAW.

The question of prospective application of a decision of this Court is not even presented unless the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971) (citations deleted). See cases summarized in *United States* v. *Peltier*, 422 U.S. 531, 544, n. 1 (1975) (Brennan, J., dissenting). Tested against this standard, the *Vitek* decision does not present a question of prospectivity. *Vitek* not only failed to overrule existing precedent but it was clearly foreshadowed, if not preordained, by previous decisions of this Court. *Vitek* simply applied familiar principles of constitutional law established in *Morrissey*, *Wolff*, and *Meachum*[1]—all of which

[1] *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Meachum* v. *Fano*, 427 U.S. 215 (1976).



were decided more than a year before appellant's transfer in 1977. In ruling that due process was applicable to statutes authorizing the transfer of mentally ill prisoners to mental institutions this Court specifically noted that it had "repeatedly held that state statutes may create liberty interests," relied for its holding upon existing authority decided from one to five years prior to appellant Keyhea's transfer, and described the lower court's conclusion as "unexceptional" in light of this Court's previous decisions (*Vitek*, *supra*, 100 S.Ct. at 1261, 1262). Indeed, given *Wolff* and *Meachum* and the fact that prisoners could be transferred only if they were, *inter alia*, mentally ill, it was ineludible that "the predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff*" (*Meachum*, *supra*, 427 U.S. at 226-227) would also be found in *Vitek*. *Morrissey*, and perhaps to a lesser extent *Wolff*, can be reasonably viewed as constituting "a sharp break in the line of earlier authority [and] an avulsive change which caused the current of the law thereafter to flow between new banks." (*Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 499 1968.) However, for precisely this reason *Vitek* must be seen as simply adhering to the current previously established by *Morrissey* and *Wolff*.

Moreover, not only was *Vitek* clearly foreshadowed by decisions of this Court but in addition by a trend of lower court decisions and commentators. Prior to *Vitek* no less than nine courts, including the District

of Columbia Circuit and Second Circuit, had voided prison-mental hospital transfer statutes similar to the statute at issue in *Vitek*.[2] The Third Circuit had strongly questioned the validity of such statutes and the commentators had uniformly concluded they were invalid on the basis of *Wolff* and *Meachum*.[3] While the Ninth Circuit in a short per curiam decision in 1965 upheld §2684 against a due process challenge (*Darey* v. *Sandritter*, 355 F.2d 22 (9th Cir. 1965)), any comfort appellees might have received from the conclusory *Darey* opinion should have been short-lived. The premise of *Darey*—that a prisoner's involuntary commitment to a mental institution is within the range of conditions of imprisonment—was rejected by this Court in several decisions rendered between 1966 and 1972 (see *Vitek*, *supra*, 100 S.Ct. at 1264). Moreover, numerous decisions recognizing that statutes could create interests entitled to due process protections were decided subsequent to *Darey*. See, e.g., *Wolff*, *supra*; *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). These decisions were inconsistent with *Darey* and clearly demonstrate that it was unwarranted to rely on *Darey* as

[2] *Matthews* v. *Hardy*, 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); *United States ex rel Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir. 1969), *cert. denied*, 396 U.S. 847 (1969); *Harmon* v. *McNutt*, 587 P.2d 537, 539 (Wash. Supreme Ct. 1978); *Chesney* v. *Adams*, 377 F.Supp. 887 (D.Conn. 1974), *aff'd without opinion*, 508 F.2d 836 (2d Cir. 1975); *United States ex rel. Souder* v. *Watson*, 413 F.Supp. 711 (M.D.Penn. 1976); *Sites* v. *McKenzie*, 423 F.Supp. 1190 (N.D.W.Va. 1976); *Evan* v. *Paderick*, 443 F.Supp. 583 (E.D.Va. 1977); *Migone* v. *Vincent*, 411 F.Supp. 1386 (S.D.N.Y. 1976); *Watson* v. *Whyte*, 245 S.E.2d 916 (W.Va. 1978).

[3] *Souder* v. *McGuire*, 516 F.2d 820 (3rd Cir. 1975); Alexander, *The New Prison Administrators and the Court: New Directions in Prison Law*, 56 Tex.L.Rev. 963, 984-985 (1978); Comment, *Transfer of Prisoners to Mental Institutions*, 69 Journal of Criminal Law and Criminology 337, 339-344 (1978).



a definitive pronouncement that §2684 was constitutionally valid. Compare *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968) (reliance on previous decision of *this* Court not justified when decision had "been under attack from its inception and many courts have, in fact, rejected it.") *Dasho* v. *Susquehanna Corporation*, 461 F.2d 11, 21 (7th Cir. 1972) (Stevens, J.) (resolution of conflict in circuits does not establish a new principle of law.)

## II.

### IF THE QUESTION IS PRESENTED, VITEK SHOULD BE GIVEN FULL RETROACTIVE EFFECT.

Even on the erroneous premise that the retroactivity of *Vitek* is here involved, appellees are incorrect in asserting that it must be given prospective effect only. First, the major purpose of the constitutional protections reaffirmed in *Vitek* would be furthered by retroactivity because those safeguards were designed to protect against what this Court described as "the inherent risk of a mistaken transfer" to a mental institution, especially given "the subtleties and nuances of psychiatric diagnoses." *Vitek*, *supra*, 100 S.Ct. at 1265. Indeed, Justice Powell in his concurring opinion specifically noted that "[i]t is unlikely that an inmate threatened with involuntary transfer to mental hospitals will possess the competence or training to protect adequately his own interest in these state-initiated proceedings." *Vitek*, *supra*, 100 S.Ct. at 1266 (Powell, J., concurring.)

Second, the burden resulting from holding *Vitek* retroactive is significantly less than that identified in *Wolff* or *Morrissey*. *Wolff* involved 19,000 and *Morrissey* 1,100 hearings per year on the federal level alone, while the California Department of Corrections estimated that 3,000 disciplinary hearings were held in a two-month period.[4] In contrast, appellants' motion estimates that 20 prisoners are transferred to mental institutions in a two-month period (Motion to Dismiss or Affirm, p. 11). And any "burden" imposed by retroactivity would be limited to those states which have continued to summarily commit prisoners despite holdings of numerous courts to the contrary (see n. 2, *supra*).

Finally, it would be exceedingly harsh and inequitable to limit *Vitek* to prospective application. Such a limitation would effectively foreclose the ability of prisoners who have been summarily committed "to live in the grievously distressing atmosphere of an institution . . . which houses the insane" (*Liles* v. *Ward*, 424 F.Supp. 675, 678 (S.D.N.Y. 1976)) to contest their commitment despite "the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all." (*Matthews* v. *Hardy*, 420 F.2d 607, 610 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).)

[4] *Fitzgerald* v. *Procunier*, 393 F.Supp. 335, 339, n. 1 (N.D.Cal. 1975).



For the reasons discussed above, the judgment of the Court of Appeal of California should be reversed by this Court.

Dated: May 22, 1980.

Respectfully submitted,

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